Although the defendant has relied on a number of grounds of appeal, it is in my view necessary to deal with only one of them. As I have said, the copy of the order made on the 2nd December 1959 which was served on the defendant's solicitors did not bear the indorsement required by Order XXXIX rule 5. Counsel for the defendant has submitted that in the absence of the indorsement the order dated the 2nd March 1960 should not have been made. In support of his argument he has cited the case of *Arumugam* v. *Suppiah Chettiar.*[1] That was a case in which an order was made by the trial Judge directing the defendant to make and file a further affidavit fully and sufficiently answering certain interrogatories which had been delivered to him by the plaintiff. The copy of the order which was served did not bear the indorsement required by section 560 of the Civil Procedure Code which was then in force and which is similar to Order XXXIX rule 5. As the defendant did not comply with the order, the plaintiff made an application for an order that the defence be struck out and that the defendant be placed in the same position as if he had not defended. When the application came before the trial Judge he made an order striking out the defence and giving the plaintiffs liberty to sign judgment on his statement of claim. The defendant thereupon appealed to the Court of Appeal and took the point, which had not been raised before the trial Judge, that the necessary indorsement had not been made on the copy of the order to answer interrogatories. It was held by the Court of Appeal that, because of this failure on the part of the plaintiff to comply with the provisions of section 560 of the Civil Procedure Code, the punishment for contempt of the defendant by striking out his defence could not properly be inflicted, and the appeal was accordingly allowed.

In the present case the order made on the 2nd December 1959 was an order for discovery of documents, but this makes no difference to the principle to be applied. The principle is laid down in *Arumugam* v. *Suppiah Chettiar, supra,* and, in applying it, I have come to the conclusion that because of the failure of the plaintiffs to make the indorsement required by Order XXXIX rule 5 on the copy of the order dated the 2nd December 1959, the order made by the learned trial Judge on the 2nd March 1960 should not have been made.

Counsel for the plaintiffs has submitted that the indorsement is required to be made only in those cases where the penalty subsequently sought to be imposed is attachment and not, as in the present case, the striking out of the defence. He has also suggested that the decision of the Court of Appeal in *Arumugam* v. *Suppiah Chettiar, supra,* was made *per incuriam.* As to this suggestion, it can be seen from the judgments of the three learned Judges of the Court of Appeal that the distinction sought to be drawn by counsel for the plaintiffs was considered by them. In my view there is no room for the suggestion that the decision was made *per incuriam.*

It was lastly contended by counsel for the plaintiffs that by filing the application on the 2nd February 1960 and asking for further time within which to comply with the order made on the 2nd December 1959 the defendant demonstrated that he was well aware of what was contained in the order and the consequences of failure to comply with it and therefore waived the irregularity. In putting forward this argument counsel for the plaintiffs was driven to rely on a dissenting judgment of Lindley L.J. in *Hampden* v. *Wallis*[2] at p. 754. The view which prevailed in the English Court of Appeal which heard this case is to be seen in the following passage from the judgment of Cotton L.J. at p. 753:—

> "In my opinion service of a summons for further time is not sufficient to shew that the person served has waived the right to object that the order is not indorsed in accordance with the Rules."

In view of the opinion of the majority of the Court in *Hampden* v. *Wallis, supra,* the contention that the defendant waived the irregularity by making an application for further time must fail.

For the reasons which I have stated the appeal must be allowed and the order made on the 2nd March 1960 and the judgment entered on the 18th March 1960 set aside. As the defendant has succeeded on a point which was not taken in the Court below by counsel who was then appearing for him, there will be no order as to costs. The deposit will be paid out to the defendant or his solicitors.

Buttrose and **Wee Chong Jin JJ.** concurred.

Appeal allowed.

Solicitors: *Hilborne & Co.; Drew & Napier.*

MAYOR SINGH v. LAU GEOK SWEE

[A. C. J. (Rigby J.) February 1, 1960]

[Penang — Civil Appeal No. 14 of 1959]

Practice and Procedure — Pleadings — No denial or traverse — Effect of — Whether issues of fact not pleaded can be raised on appeal.

Landlord and Tenant — Land qua land not premises — Subsequent erection of building of temporary character — Whether protected by Control of Rent Ordinance, 1956.

In this case the respondent was given possession of land as against the appellant who was his tenant. The respondent claimed that the land, when originally let, was vacant land and there had since been erected thereon a building of a temporary character which was occupied by the appellant. The appellant in his defence had not attempted to deny or traverse the correctness of those averments.

Held: (1) in the absence of any denial it must be assumed, as a matter of pleading, that the appellant admitted that the land was vacant when originally let and he admitted that the building subsequently erected thereon was a building of a temporary character;

(2) the appellant cannot raise issues of fact which were never pleaded before the trial Court.

Case referred to:—

(1) *Evelyn Saw Hee Li* v. *Gan Tit Sun* [1959] M.L.J. 146.

CIVIL APPEAL.

Jag-Jit Singh for the appellant.

Wong Sai Heng for the respondent.

Rigby J. delivering oral judgment: This is an appeal from a decision of the learned President of the Sessions Court, whereby he gave judgment for the plaintiff that as owner of the piece of land known as Lot 180(1) T.S. 3, N.E.D., Penang, he was entitled as against the present appellant to an order for possession of that piece of land. The learned President held that on the pleadings as they stood before him he was bound by the decision of this Court in the case of *Evelyn Saw Hee Li* v. *Gan Tit Sun*(1). In that case I held that land, *qua* land, did not come within the definition of premises and could not, therefore, come within the protection of the Control of Rent Ordinance. Mr. Jag-Jit Singh, for the appellant, would seek to argue that that decision does not apply where the land, when originally let, was vacant land and where, thereafter, a building of a permanent character has been built thereon with the knowledge and consent, whether express or implied, of the landlord. Mr. Jag-Jit Singh would seek to contend that in such a case the building, having become affixed to the realty, becomes "premises comprised in a tenancy" and, therefore, comes within the Control of Rent Ordinance, 1956.

Speaking for myself, I should have been glad to have heard that argument and, indeed, glad to have been in a position, if necessary, to allow a further appeal from this Court on this point which is, in my view, a matter of very considerable practical interest and importance. But unfortunately, it seems to me that on the pleadings that argument is no longer available to the appellant and that he must be bound by the pleadings as they stand.

By paragraph 12 of the Statement of Claim it was averred that the land, when originally let, was vacant land and there has since been erected thereon a building of a temporary character known as No. 83-C, York Road, Penang, which is at present occupied by the appellant. The appellant, by his Statement of Defence, has not attempted to deny or traverse the correctness of those averments. All that he has said is that he is the occupier of the house known as No. 83-C, York Road. In the absence of any denial it must, I think, be assumed, as a matter of pleading, that the appellant admitted that the land was vacant when originally let and that he admitted that the building subsequently erected thereon was a building of a temporary character. Mr. Jag-Jit Singh, as I understand it, concedes that if, in fact, the building was of a temporary character then he would have no argument that it came within the provisions of the Control of Rent Ordinance. It seems to me perfectly clear on the pleadings that the sole issue before the learned President was a claim for possession of land, *qua* land. The appellant, by his Statement of Defence, refers therein to his attempts to pay the ground rent.

In my view, on the pleadings as they stood before the learned President he was correct in holding that he was bound by the decision of this Court, and on the pleadings as they stood he was correct in giving judgment for the plaintiff for possession of that piece of land which he claimed. The appellant cannot now raise issues of fact which were never pleaded before the trial Court. The appeal must accordingly be dismissed with costs.

Appeal dismissed.

Solicitors: *Jag-Jit Singh; Lim Kean Siew.*

HO CHOOI SOON v. THE INDIAN OVERSEAS BANK LTD.

[O. C. J. (Rigby J.) February 5, 1960]

[Penang — Civil Suit No. 220 of 1959]

Bank and Banking — Cheque — Conversion — Forged indorsement — Proceeds of cheque paid into customer's account under mistake of fact — Notice of forgery — Delay — Whether precludes banker from debiting customer's account — Bill of Exchange Ordinance, 1949, ss.29 and 82.

Practice and Procedure — Order 14 — Unconditional leave to defend.

In 1957 the plaintiff paid an uncrossed cheque to the credit of his account with the defendant Bank. The cheque was drawn by an Insurance company in favour of one Yeo Wee Yang, whose purported endorsement was guaranteed by the Secretary of the company. The plaintiff endorsed on the cheque and stamped it with the words "Endorsement Guaranteed". The defendant Bank crossed it specially to itself after it had received it for collection, and credited the proceeds to the plaintiff's account. Two years later they were informed by the solicitors of the Insurance company that the indorsement of the payee Yeo Wee Yang was forged and that they demanded repayment of the proceeds of the cheque as true owners thereof. In the event plaintiff's account was debited. Consequently the plaintiff instituted proceeding's against the defendant Bank claiming damages for wrongful conversion; in the alternative, he claimed repayment.

On a summons under O. 14 the Registrar gave leave to the plaintiff to sign final judgment against the defendant Bank for the amount claimed. The defendant Bank appealed.

Held: the defendant Bank were entitled to debit the plaintiff's account with the value of the cheque and the appeal ought to be allowed and they be given unconditional leave to defend the action.

Cases referred to:—

(1) *The London & River Plate Bank Ltd.* v. *The Bank of Liverpool Ltd. & Ors.* [1896] 1 Q.B. 7.

(2) *Capital & Counties Bank Ltd.* v. *Gordon* [1903] A.C. 240.

(3) *Bavins, Junr. & Sims* v. *London & South Western Bank Ltd.* [1900] 1 Q.B. 270.

(4) *The Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A.C. 49.

APPEAL FROM THE REGISTRAR.

The following facts are taken from the judgment of Rigby J.: On May 20, 1957, the plaintiff paid a cheque for $3,243.87 to the credit of his account with the defendant Bank. The cheque, dated May 13, 1957, was drawn on the Hongkong & Shanghai Banking Corporation by